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IN THE

Supreme Court of the United States

October Term, 1965
No. 539

BANK OF AMERICA NATIONAL TRUST AND SAVINGS ASSOCIATION, a national banking association,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

REPLY BRIEF OF PETITIONER.

I.

Comment Upon the Position of the United States.

The respondent, United States, in its brief, distorts the record and the argument of the petitioner Bank in an attempt to make it appear that the courts below deemed applicable and carefully reviewed the law of California and came to the conclusion that the construction of Section 440 of the California Code of Civil Procedure contended for by the Bank is not supported by the appellate decisions of the California courts.

The lower courts did not concern themselves with the law of California. Both the trial court and the

Ninth Circuit took the position that the decision in *Bank of Nevada v, United States*, 251 F. 2d 820 (9th Cir. 1957) which involved a Nevada transaction was determinative of this matter. (App'x. B, Pet. p. 16.) There is no discussion in the opinions below, or in fact, any mention of any decisions of the California appellate courts on the subject.

The only conclusion that can be drawn is that the Ninth Circuit has in effect taken the position that the entire question is a question of federal law and has refused to follow the decisions of the Supreme Court under Section 6323 of the Revenue Code of 1954 dealing with "property and rights to property".

It is true that the federal tax liens were recorded prior to the times when the obligations of the taxpayer Edmondson to the Bank were incurred. Federal tax liens, however, only attach to "property and rights to property". The basic position of the Bank is that there was never a moment when the taxpayer Edmondson had any "property or rights to property" in the bank deposits to which federal tax liens could attach. Under the applicable law—the law of California—the obligation of the Bank to Edmondson was no more than to pay to him or his order a debt equal in dollar amount to the deposits *provided* he first discharged his obligations to the Bank.

II.

Argument.

The effect of Section 440 of the California Code of Civil Procedure is clearly defined by the California Supreme Court in *Jones v. Mortimer,* 28 Cal. 2d 627, 170 P. 2d 893 (1946) and *Hauger v. Gates,* 42 Cal. 2d 752, 269 P. 2d 609 (1954). Under these decisions, Section 440 of the California Code of Civil Procedure is no ordinary set-off statute. These cases, in effect, are rulings that to the extent that cross-demands exist, they are automatically deemed paid, discharged and extinquished. In other words, under California law, cross-demands automatically compensate each other. No action to effect an offset is required of the parties. By operation of law, one claim offsets the other. To paraphrase a statement of this court, the words of the California Supreme Court have become the words of the California statute. *National Association for the Advancement of Colored People v. Button,* 371 U.S. 415, 432 (1963). These key California cases were completely ignored by the courts below and in the brief of the United States. Under such circumstances, can it possibly be said that this case involves only a question of California law which was correctly decided in the courts below? Our first point is that there was no real consideration of the California law in the courts below. They attempt to hide behind the label "set off" rather than determine the exact effect of Section 440 of the California Code of Civil Procedure as determined by the California appel-

late decisions. This necessarily follows from the fact that the lower courts rested on *Bank of Nevada* which had nothing to do with the law of California.

The United States, in its brief, cites the 1897 California Supreme Court case of *Ainsworth v. Bank of California,* 119 Cal. 470, 51 P. 552 (1897) apparently because in the decision, Section 440 of the California Code of Civil Procedure is referred to as a set-off statute. Other cases such as *Murchison v. Murchison,* 219 Cal. App. 2d 672, 33 Cal. Rptr. 383 (1963) appear to be cited for the same reason. There is nothing inconsistent in these decisions with the rulings of the California Supreme Court in *Jones* and in *Hauger.* Unlike earlier California cases, *Jones* and *Hauger* state how the offset or compensation is accomplished under Section 440 of the California Code of Civil Procedure. The United States does not meet the argument of the Bank by ignoring these definitive decisions or by suggesting, without citing any case in support thereof, that the effect of Section 440 of the California Code of Civil Procedure is different where a bank account[1] or the rights of a third party are involved.

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[1]The footnote in 8 Tulane Law Review 423 referred to in the brief of the United States purports merely to set forth the opinion of the student writer as to the law of Louisiana and France. Law review articles as to the "civil law" and decisions of other jurisdictions and to other or even similar statutes even if we were to indulge in the invalid assumption that they represent the weight of authority—are irrelevant. As to the California statutes the federal courts are bound by the interpretation of the California Supreme Court. *Marine National Exchange Bank v. Kalt-Zimmers Mfg. Co.,* 293 U.S. 357, 363; *United States v. Combest,* 286 U.S. 424, 427.

The United States says (Br. 9) that the crucial question is "whether, at the time of the levy, the deposits were in realty being held in the taxpayer's accounts."[2] The problem whether the alleged debtor holds "property rights" subject to levy is not to be determined by mere labels. Neither is the test whether the deposits were being "held in the taxpayer's account". (Gov. Br. p. 9). As this court held in *United States v. Bess,* 357 U.S. 51, 55-56 (1958), the existence of the requisite "property" under state law is to be determined by ascertaining whether the taxpayer had rights to enjoinment that could be enforced by the taxpayer under the state law. We say therefore, the crucial question is whether the taxpayer had under California law a legal right at any time to the deposits as against the Bank.

As far as *Bank of Nevada* is concerned, there is no statute in Nevada similar to Section 440 of the California Code of Civil Procedure.[3] Besides, *Bank of Nevada* is distinguishable upon the facts, is basically wrong in concept, and should be overruled because it is

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[2]In *United States v. Bank of United States,* 5 F. Supp. 942 (S.D.N.Y. 1934) the Court ruled that the fact that the taxpayer was permitted to use the account up until the time of the levy was not determinative and that in effect the bank had merely given the taxpayer a revocable license to use the account.

[3]The Court in *Bank of Nevada* makes no mention of *United States v. Bank of Shelby,* 68 F. 2d 538 (5th Cir. 1934) or *United States v. Bank of United States, supra,* both of which were decided in 1934 and are directly contrary to the position taken by the Court in *Bank of Nevada.* The United States attempts to distinguish these cases on the basis that the indebtedness owing the bank arose prior to the recording of the Federal tax liens. In *Bank of Shelby,* the deposits were made on June 8, 1925, and on June 18, 1925 the tax lien levy was made and offset effected. The deposit against which the offset was made was the

basically inconsistent with the subsequent decisions of the Supreme Court in the line of cases beginning with *United States v. Bess, supra.*[4]

The importance of the question to California banks is attested to in the amicus brief filed on behalf of the California Bankers Association in support of the Bank's petition. It is of utmost importance that this Court settle once and for all the question here involved. There is no basis whatsoever for the statement that a favorable decision to the Bank would result in impossible bookkeeping problems for banks as is suggested by the United States in its brief.

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result of a loan transaction entered into on June 8, 1925. The decision in no way turns upon the fact that there were indebtednesses of the taxpayer to the bank which antedated the recording of the federal tax lien. Surely, the federal tax lien could not have attached at any time prior to the deposit on June 8, 1925. The same basic factual situation is found in *United States v. Bank of United States, supra.*

[4]On August 27, 1959 the date of the levy in the instant case, there was due on the matured indebtednesses of the taxpayer Edmondson to the Bank an amount in excess of the monies on deposit in the bank accounts. In *Bank of Nevada,* the court reasoned that there was no showing that any sum was due until after the levy when an attempt was made to accelerate the indebtedness on the basis of an acceleration agreement and financial statement of the taxpayer filed with the Bank of Nevada. It was argued that the indebtedness was evidenced by a demand note, but this argument was rejected by the court on the ground that the note was payable "on demand; if no demand is made then on August 14, 1955," and that such an obligation is not a true demand note which is due from its date but becomes due only upon actual demand or upon the specified date. Levy in that case was made prior to August 14, 1955 and no demand was made until after the levy. In short, *Bank of Nevada* involved a situation where the court in effect took the position that there was no evidence whatsoever that the monies were due from the bank customer and taxpayer to the bank at the time of the levy or any time prior thereto. On the other hand, the United States, in the instant case, upon whom the burden of proof rests, has failed to prove that there was ever a time when the taxpayer Edmonson could

III:
Conclusion.

It is submitted that the writ of certiorari should be granted in order to review the judgment of the court below or in the alternative to vacate and remand for a more careful determination of the property rights of the petitioner and the taxpayer-depositor under the applicable state law.

Respectfully submitted,

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insist upon the bank paying to him the deposits in question without first discharging his indebtednesses to the bank. In *Bank of Nevada,* the court speaks of the taxpayer's inchoate agreement relative to acceleration. Here, we are not concerned with any inchoate agreement. First in time, first in right, has nothing to do with the matter. We are involved with the threshold question what, if any, were the property and the property rights of the taxpayer.